SUBJECT INDEX

	PAGE
Jurisdictional showing	1
Statement of Case	2
Answer to brief of Southern Railway Co., Case No. 415	3
Plea to Jurisdiction	3
Federal Court jurisdiction not controlled by State Laws	5
Louisiana Statutes and Jurisprudence affecting service of process on foreign corporations	18
Error No. Two, Southern. Alleged erroneous admission of hearsay evidence, statements of doctors	27
Error No. Three, Southern. Alleged erroneous admission of letter	30
Error No. Four, Southern. Alleged erroneous denial peremptory instruction on claim for loss of earnings	33
Error No. Five, Southern. Alleged erroneous peremptory charge of joint liability	35
Conclusion, Southern	35
Answer to brief of Louisville & Nashville R. R. Co., Case No. 414	36
Assignment No. One, L. & N.	36
Assignments Nos. Two and Three, L. & N.	41
Charge given by trial court	46
Charge given by trial court reference joint liability	49
Conclusion	50

TABLE OF CASES

Allaun vs. Glen Brook Coal Co., 227 Fed. 335 31

Act 184 of 1924, Louisiana Law 25

Ayers vs. Watson, 137 U. S. 584 47

Barrow vs. Kane, 170 U. S. 108 ..... 5, 12

Bell vs. N. O. & N. E. R. R. Co., 2 Ga. App. 812, 59 S. E. 102 11

Block vs. Atchison, T. & S. F. R. Co., 21 Fed. 529 10

Bagdon vs. Phila. & Reading C. & I. Co., 217 N. Y. 432 ..... 11, 14

Buscher vs. Southern Ry. Co., 4 La. C. A. 653 21

Baltimore, Etc., R. Co. vs. McLaughlin, 73 Fed. 519 40

Blatcher vs. Phila., Etc., R. Co., 31 App. (D. C.) 385 45

Brook vs. Brooklyn Union El. R. Co. 148 App. Div. 668, 133 N. Y. S. 253 45

Brown vs. U. S., 150 U. S. 93 47

Chatters vs. L. & N. R. R. Co. et al., 17 Fed. (2) (D. C. E. D. La.) 305 1

Commercial Mutual Accident Co. vs. Davis, 213 U. S. 245 9

Central of Ga. Ry. Co. vs. Eichberg, 68 A. 690, 107 Md. 363 11

Chesapeake & O. Ry. Co. vs. Stojanowski, 191 Fed. 720 11

Cowen vs. Winters, 96 Fed. 929 19

Cooper vs. Coates, 21 Wall. 105, 110 29

Columbia, Etc., R. Co. vs. Means, 136 Fed. 83 41

Clements vs. Wash. P. S. B. Co., 162 Fed. 815 45

Chollette vs. Omaha, Etc., R. Co., 26 Nebr. 159 45

Cunningham vs. Springer, 204 U. S. 647 49

Continental Imp. Co. vs. Stead, 95 U. S. 161 49

Clymer vs. Dawkins, 3 How. 674 49

Denver & R. G. R. Co. vs. Roller, 100 Fed. 738 11

Diamond Glue Co. vs. U. S. Glue Co., 187 U. S. 611 11

Delatour and Marmouget vs. Southern Railway Co., 4 La. C. A. 658 ..... 21, 22

Elk Garden Co. vs. T. W. Thayer Co., 179 Fed. 569 6

El Paso & N. E. Ry. Co. vs. Landon, 124 S. W. 744, 58 Tex. Civ. App. 397 45

Fidelity Mutual Life Ass'n. vs. Mettler, 185 U. S. 308 29

Goldey vs. Morning News, 156 U. S. 518 5

Gleeson vs. Virginia Midland R. Co., 140 U. S. 435 40

Georgia R. R. Co. vs. Hunter, 12 Ga. A. 294 47

Harrison vs. St. Louis & S. F. R. Co., 232 U. S. 318 5

Hart vs. Penn. R. R. Co., 112 U. S. 331 40

International Harvester Co. vs. Commonwealth, 234 U. S. 579 12

Interstate Amusement Co. vs. Albert, 239 U. S. 560 12

International Text Book Co. vs. Peterson, 218 U. S. 664 12

Inman vs. So. Carolina R. Co., 129 U. S. 128 40

Irvine vs. Delaware, Etc., R. Co., 184 Fed. 664 ..... 40, 41

Kansas City Western R. Co. vs. McAdow, 240 U. S. 51 12

Louisville & Nash. R. R. Co. and Southern Ry. Co. vs. Chatters, 26 Fed. (2) (5th C. C. A.) 403 1

Lehigh Valley R. Co. vs. Dupont, 128 Fed. 840 ..... 19, 43, 44

Louisiana Statute, Service of Process 25

Munter vs. Weil Corset Co., 261 U. S. 276 5

Mechanical Appliance Co. vs. Castleman, 215 U. S. 437 5

Mexican Cent. Ry. Co. vs. Pinkney, 149 U. S. 194 5

Mo., Kan. & Tex. Ry. Co. vs. Reynolds, 255 U. S. 565 ... 6

Michigan Aluminum Foundry Co. vs. Alum. Castings Co., 190 Fed. 879 ... 6

Mitchell Furniture Co. vs. Selden Breck Co., 257 U. S. 213 ... 12, 13

Missouri Pacific R. R. Co. vs. Clarendon Boat Oar Co., 257 U. S. 533 ... 21

Meeker vs. Lehigh Valley R. Co., 236 U. S. 434 ... 29

Missouri Pacific R. R. Co. vs. Prude, 265 U. S. 99 ... 37, 39

Midland Valley R. Co. vs. Conner, 217 Fed. 956 ... 40

Meehan vs. Valentine, 145 U. S. 611 ... 43

Missouri, Etc., R. Co. vs. Ryan, (Tex. Civ. A.) 177 S. W. 525 ... 45

Missouri, Etc., R. Co. vs. Foster, (Tex. Civ. A.) 87 S. W. 879 ... 45

Maryland Fidelity, Etc., Co. vs. Courtney, 186 U. S. 342 ... 46

New York Cent. R. Co. vs. Lockwood, 17 Wall. 357 ... 40

New Jersey R., Etc., Co. vs. Pollard, 22 Wall. 341 ... 40

Northern Pac. R. Co. vs. Babock, 154 U. S. 190 ... 46

New York, Etc., R. Co. vs. Winter, 143 U. S. 60 ... 49

Old Wayne Mutual Life Assn. vs. McDonough, 204 U. S. 8 ... 12, 15

Philadelphia & Reading Ry. Co. vs. McKibben, 243 U. S. 264 ... 6

Penn. Lumbermen's Mutual Fire Ins. Co. vs. Meyer, 197 U. S. 415 ... 9

Penn. Fire Ins. Co. vs. Gold Issue Min. & M. Co., 243 U. S. 93 ... 15

Phoenix Ins. Co. vs. Erie, Etc., Transportation Co., 117 U. S. 312 ... 40

Penn. Co. vs. Roy, 102 U. S. 451 41

Reynolds vs. Missouri, Etc., R. Co., 224 Mass. 379, 113 N. E. 413 11

St. Louis S. W. Ry. vs. Alexander, 227 U. S. 218 ..... 6, 9

Smolik vs. Phila. & Reading C. & I. Co., 222 Fed. 148 11

Simon vs. Southern Railway Co., 236 U. S. 115 ..... 12, 13

Simon vs. Southern Ry. Co., 195 Fed. 56 (C.C.A. 5th Cir.) 17

Sou. Pacific Co. vs. DeValle da Costa, 190 Fed. 689 ..... 29, 32

St. Louis R. R. Co. vs. Duke, 192 Fed. 306 29

Snyder vs. Rosenbaum, 215 U. S. 261 47

Tauza vs. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915 12

Texas Cent. R. Co. vs. Marris, 101 S. W. 1177, 100 Tex. 530 45

Union Cons. Silver Min. Co. vs. Taylor, 100 U. S. 37 ..... 29, 32

Walsh vs. Atlantic Coast Line Ry. Co., 256 Fed. 50 ..... 5, 10

Watkins (State ex rel.) vs. North American Land & Timber Co., 106 La. 621 ..... 22, 23

Williams vs. Poke Mfg. Co., 52 La. Ann. 1417 ..... 22, 24

Wilhite vs. Houston, 200 Fed. 390, 118 C. C. A. 542 ..... 29, 32

Webb vs. Barling, 14 Wall. 406, 417 29

Nos. 414 and 415

United States Supreme Court.

OCTOBER TERM, 1928

SOUTHERN RAILWAY COMPANY ET AL.,
Petitioners.

versus

AARON A. B. CHATTERS,
Respondent.

Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF RESPONDENT.

May It Please the Court:

This brief is intended as an answer to the brief of the Southern Railway Co. and the brief of the Louisville and Nashville Railroad Co., petitioners, seeking to reverse the judgments of the United States District Court in and for the Eastern District of Louisiana and of the United States Circuit Court of Appeals, Fifth Circuit. The decisions of the lower courts are reported as *Chatters vs. Louisville and Nashville Railroad Co. et al.*, 17 Fed. (2) (D. C. E. D. La.) 305, and *Louisville and Nashville Railroad Co. and Southern Railway Co. vs. Chatters*, 26 Fed. (2) (5th C. C. A.) 403. The case is before this Court by reason of writs of certiorari granted to the Court of Appeals, Fifth Circuit.

STATEMENT OF CASE.

A statement of the case is fairly presented in the brief of the Southern Railway Co., Case No. 415, October Term, and we will confine ourselves to stressing those facts which we believe important to the case of respondent. For the sake of brevity, we will hereafter mention the Louisville and Nashville Railroad Co. as L. & N., and the Southern Railway Co. as Southern.

On January 26, 1926, respondent purchased a THROUGH ticket from the L. & N. AT NEW ORLEANS, for THROUGH transportation from New Orleans to Washington, D. C. On the following day he boarded a train known as "Piedmont Limited" at the L. & N. Station and took quarters in combination coach No. 698. He rode in this same coach from New Orleans to Washington. The coach was owned by the Southern, but was cleaned and inspected by the L. & N. at New Orleans. When about two hours' journey from Washington, a screen frame became detached from its mooring and crashed through a pane of glass. Fragments of the shattered glass lodged in respondent's eyes, causing very painful and long enduring suffering. Suit was brought in the United States District Court for the Eastern District of Louisiana, respondent's domicile, on the ground of diversity of citizenship and claim exceeding $3,000. The Southern is a Virginia corporation, with an agent appointed in the State of Louisiana to receive service of process. The L. & N. is a Kentucky corporation, but owns and operates railroad lines and terminals within the State of Louisiana and has an agent appointed within the State to receive service of process.

ANSWER TO BRIEF OF SOUTHERN RAILWAY CO., CASE NO. 415, OCTOBER TERM.

We will answer the contentions of the Southern, and those of the L. & N., Case No. 414, October Term, in one brief, feeling it will serve the same purpose as placing the matter in two briefs.

The Southern urges the following errors:

1st. Overruling plea to the jurisdiction;

2nd. Admission of plaintiff's testimony as to statements made to him by two physicians;

3rd. Admission of a letter referring to the status of a corporation by whom respondent had been employed;

4th. Denial of motion to instruct jury to find for defendants upon plaintiff's claim for $500.00, asserted loss of earnings as a representative of Mullins River Lumber Co.;

5th. Charge of District Judge to the jury that defendants in this case are jointly liable to plaintiff under contract of carriage.

PLEA TO JURISDICTION.

Jurisdiction of the Federal Court for the Eastern District of Louisiana is based upon the following facts:

1st. The ticket upon which this suit is based was purchased in New Orleans. This is admitted by both defendant companies.

2nd. The Southern Railway Co. appointed Mr. J. E. Fitzwilson its agent to receive service of process in New Orleans. This is admitted by the Southern. An agent had been maintained in the State of Louisiana for a number of years prior to the institution of this suit and had never been withdrawn.

3rd. The coaches making up the train, called "Piedmont Limited," which transported respondent from New Orleans to Washington, were furnished by the Southern Railway Co., A. W. P., and the Louisville & Nashville R. R. Co., the proportion of each being determined by agreement on the mileage basis. (Rec. p. 210.)

4th. The Southern directly employs nine persons "soliciting business and working up freight rate information for the public," who are quartered in Room 303 Terminal Passenger Station, New Orleans. Another group of seven is employed in passenger solicitation, with offices maintained in two separate locations, 300 Terminal Station, New Orleans, and the other on the ground floor of the St. Charles Hotel, St. Charles Street, New Orleans. (Rec. pp. 73, 79.)

5th. The Southern Railway Co. owns practically all of the stock of the New Orleans Northeastern R. R. Co., and practically all of the stock of the New Orleans Terminal Co., both Louisiana corporations, domiciled in New Orleans, which companies own property in New Orleans valued at millions of dollars. (Rec. p. 80.)

6th. The president and officers of these two Louisiana corporations and of the Southern Railway Co. are one and the same. (Rec. p. 75.)

7th. A number of officials, in addition to the employes heretofore referred to, are employed in New Orleans whose salaries are paid jointly by the three companies. (Rec. pp. 72, 73, 74.)

These facts unquestionably show: That the Southern Railway Co. is doing business and is present in the City of New Orleans, and that it has an agent in the City of New Orleans to receive service of process. Proof of those facts gives jurisdiction to the Federal Court of New Orleans.

FEDERAL COURT JURISDICTION NOT CONTROLLED BY STATE LAWS.

Jurisdiction of this case was acquired by the Federal District Court for the Eastern District of Louisiana because of diversity of citizenship, claim exceeding $3,000, and domicile of the plaintiff. This is predicated upon the Constitution and Laws of the United States. Art. III, Sec. two, Constitution of the United States, Sections 24 and 51 of the Judicial Code.

It has been repeatedly decided by this Court that neither the statutes of the state nor the decisions of its courts are conclusive upon the Federal Courts.

In the case of *Munter vs. Weil Corset Co.*, 261 U. S. 276, 278, it was said:

> "We have decided in cases which concern the jurisdiction of Federal Courts that notwithstanding the Conformity Act, neither the statutes of the states nor the decisions of their courts are conclusive upon the Federal Court, the determination of such questions being 'in this Court alone.' *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 443."
>
> *Goldey vs. Morning News*, 156 U. S. 518, 520, 523.
> *Barrow vs. Kane*, 170 U. S. 108.
> *Mexican Cent. Ry. Co. vs. Pinkney*, 149 U. S. 194.
> *Harrison vs. St. Louis & S. F. R. Co.*, 232 U. S. 318.
> *Walsh vs. Atlantic Coast Line Ry. Co.*, 256 Fed. Rep. 50, 51.

The cases just cited establish the fact that the jurisdiction of the Federal Courts are not dependent upon state laws or the construction of those laws.

The next logical step is to inquire, under what conditions will the Federal Courts acquire jurisdiction over

a foreign corporation. Two conditions are set forth by practically all of the decisions of this Court:

1st. Was the corporation within the jurisdiction in which it was sued?

2nd. Was process served upon an authorized agent of the corporation?

St. Louis S. W. Ry. vs. Alexander, 227 U. S. 218, 226.
Philadelphia & Reading Ry. Co. vs. McKibben, 243 U. S. 264.
Mo., Kan. & Tex. Ry. Co. vs. Reynolds, 255 U. S. 565.
Michigan Aluminum Foundry Co. vs. Aluminum Castings Co., 190 Fed. 879.
Elk Garden Co. vs. T. W. Thayer Co., 179 Fed. 569.

In the case of *St. Louis S. W. Ry. Co. vs. Alexander*, 227 U. S. 218, cited above, this Court said:

> "In this class of cases, where it is undertaken to hold a corporation personally liable in a foreign jurisdiction, two questions ordinarily arise: First, Was the corporation within the jurisdiction in which it is sued? The second, Was process duly served upon an authorized agent of the corporation? As to the latter question, there is little difficulty in this case, etc. * * * The other question, as to the presence of the corporation within the jurisdiction of the court in which it was sued raises more difficulty. A long line of decisions in this court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof. (Number of cases quoted.)
>
> "This court has decided each case of this character upon the facts brought before it and has laid down no all-embracing rule by which it may be

determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction."

The facts upon which respondent depends to show the presence of the Southern Railway Co. in the City of New Orleans and that it is doing business in that City have been stated heretofore on page — of this brief. They will be repeated because we feel they are important:

1st. The ticket upon which this suit is based was purchased in New Orleans;

2nd. The Southern Railway Co. appointed Mr. J. E. Fitzwilson its agent to receive service of process and his appointment was still in full force and effect when this action was instituted;

3rd. The coaches making up the train which respondent boarded on his journey to Washington were owned by the L. & N., A. & W. P., and the Southern Railway Co., and the train called "Piedmont Limited" was operated out of New Orleans by the three companies under an agreement between themselves.

4th. The Southern directly employs nine persons "soliciting business and working up freight rate information for the public," who occupy an office in New Orleans. Another group of seven is employed in passenger solicitation, with offices maintained in two separate locations, 300 Terminal Station, New Orleans, and the other on the ground floor of the St. Charles Hotel. (This last location is the office where tickets are sold and known as the ticket office.)

5th. The Southern Railway Co. owns practically all of the stock of the New Orleans Northeastern R. R. Co., and practically all of the stock of the New Orleans Terminal Co., both Louisiana corporations, domiciled in New

Orleans, which companies own vast quantities of real estate and railroad equipment located in New Orleans;

6th. The president and other officers of these two Louisiana corporations and of the Southern Railway Co. are one and the same;

7th. A number of officials, in additional to the sixteen employees already referred to, are employed jointly by the three companies and their salaries are jointly paid by the same companies.

For the information of the Court, we believe it is well to state that the Southern owns or controls a number of railroad lines running between New Orleans and Cincinnati and between New Orleans and New York. All of these roads form one continuous system which is termed "Southern Railway System." In New Orleans it owns and controls the New Orleans & Northeastern R. R. Co. and the New Orleans Terminal Co. These two companies are part of the system. On Canal Street, in the heart of New Orleans, there is a railroad passenger station, known as the "Terminal Station." An electric sign with large letters is located above the entrance reading "Southern Railway." (Rec. p. 76.) In this building are housed the nine freight solicitors and three passenger solicitors, heretofore referred to. On St. Charles Street, on the ground floor of the St. Charles Hotel, one of the leading hotels of New Orleans, is located the ticket office of the Southern Railway Co., where four employees of the Southern Railway Co. are located. Over the entrance to this office there is also located a sign reading "Southern Railway System." (Rec. p. 79.) It is needless to argue that a ticket office is a place where tickets are bought and sold, and we should be allowed to presume that the four agents of the Southern Railway Co. are located in the ticket office to sell tickets for the Southern Railway Co.

The testimony of Mr. A. B. Stoll (Rec. pp. 67 to 85), Chief Clerk to the Executive Agent of the Southern Railway System, whose salary is paid partly by the Southern Railway Co., clearly shows that the Southern Railway Co. is present and doing business in the City of New Orleans.

The case at bar is rather similar to the case of *St. Louis S. W. Ry. Co. vs. Alexander*, 227 U. S. 218, 228, where this Court summarized the facts as follows:

> "The testimony disclosed that the two roads together constitute a continuous line from St. Louis, through the states of Illinois, Missouri, Tennessee, Arkansas and Louisiana into Texas, and are together known as the 'Cotton Belt Route.' This combination has an office in the City of New York, upon the door of which, as upon the stationery and literature of the companies, the symbol 'Cotton Belt Route' is used. Underneath appears the general description, 'St. Louis Southwestern Lines,' and there is also named a general eastern freight agent and traveling freight agent of the lines. With this joint freight agent at the office in New York the matter of plaintiff's claim was taken up and considered and correspondence concerning it was had through this office, and a settlement of the claim attempted. * * * In this situation we think this was the transaction of business in behalf of the company by its authorized agent of such manner as to bring it within the district of New York, in which it was sued, and to make it subject to the service of process there. See in this connection *Penn. Lumbermen's Mutual Fire Ins. Co. v. Meyer*, 197 U. S. 415; *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245, 255."

Respondent's case is far stronger than the one just quoted. The present case shows that the Southern is actively present in the City of New Orleans by reason of six-

teen employees located in three different offices, one a ticket office; a number of joint officials; ownership of two local railroad corporations; and last, but not least, an agent to receive service of process. This last fact is a confession that it is doing business in Louisiana. If it is not, there is no good reason for his appointment. In the case just quoted (227 U. S. 218), the railroad company had not appointed an agent. Service was made upon a director of the company.

In the case of *Walsh vs. Atlantic Coast Line Ry. Co.*, 256 Fed. 50, 51, the Federal Court of Massachusetts, said:

> "In this case the defendant was maintaining an office on one of the principal streets of Boston, for which it was paying a very substantial rent; it kept there an agent who was under salary, and whom it advertised as its 'New England Agent;' it also hired and paid an office force to transact its business, through this office and force; it solicited business and arranged for the transportation of persons and freight over its lines. The business carried on at the Washington Street office was not Mr. Johnson's business; it was the business of the defendant. The cause of action here alleged arose out of defendant's undertaking to transport the plaintiff as passenger. While it was not transporting passengers in New England, it was soliciting that sort of business here, and was making contracts in relation thereto. Business evidently of a pretty wide scope, and—to judge from the rent paid and the office force maintained—of substantial volume, between the defendant, on the one side, and passengers and shippers of freight, on the other, was transacted through the Washington St. office. The plaintiff's claim arose out of that sort of business."

In the case of *Block vs. Atchison, T. & S. F. R. Co.*, 21 Fed. 529, 530, the Missouri Circuit Court of Appeals said:

"But, in this case, this corporation defendant has established a business office here, and has an agency. It does not run its railroads here, carry passengers, or transport freight within this district, but it has an office here for the purpose of soliciting business, and has an agent here—not subagent, but a direct agent—employed for the purpose of furthering the transportation business of the corporation in the states where its road runs; the same as various manufacturing and insurance corporations have offices established in different cities for the purpose of extending their business; and, wherever they have an office established, an agency is created."

To the same effect is the case of *Central of Ga. Ry. Co. vs. Eichberg*, 68 A. 690, 107 Md. 363, 14 L. R. A. (N. S.) 389.

Other cases where solicitation of freight and passenger trade, coupled with an office in the State, was held to be doing of business in the State, are the following:

Denver & R. G. R. Co. vs. Roller, 100 Fed. 738, 49 L. R. A. 77;

Chesapeake & O. Ry. Co. vs. Stojanowski, 191 Fed. 720;

Bell vs. N. O. & N. E. R. Co., 2 Ga. App. 812, 59 S. E. 102;

Reynolds vs. Missouri, Etc., R. Co., 224 Mass. 379, 113 N. E. 413;

Bagdon vs. Philadelphia & Reading C. & I. Co., 217 N. Y. 432;

Smolik vs. Philadelphia & Reading Coal & Iron Co., 222 Fed. 148.

Other cases, not involving railroads, wherein the Courts have held a corporation was doing business in a foreign State, are the following:

Diamond Glue Co. vs. U. S. Glue Co., 187 U. S. 611;

International Harvester Co. vs. Commonwealth, 234 U. S. 579;
Interstate Amusement Co. vs. Albert, 239 U. S. 560;
International Text Book Co. vs. Peterson, 218 U. S. 664;
Tauza vs. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915.

We believe it has been demonstrated that the jurisdiction of the Federal Courts is separate and distinct from that of the state courts; that in acquiring jurisdiction over a foreign corporation, Federal Courts ask only two questions: First, is the corporation present in the state by doing business? Second, has the proper agent been served with process?

The facts in this case positively show that the Southern Railway Co. is present in Louisiana and is doing business in that State.

The action being transitory, it is not confined to the jurisdiction of any particular Court:

Kansas City Western R. Co. vs. McAdow, 240 U. S. 51, 60 L. Ed. 521;
Barrow S. S. Co. vs. Kane, 170 U. S. 100, 42 L. Ed. 964.

The Southern Railway Co. makes the further contention that though it is doing business in Louisiana and is present and found within the State, and though its proper agent has been served with process, still the Federal Courts are without jurisdiction because the business out of which this cause of action arises was not done in the State of Louisiana. In maintaining that position, it relies principally upon three cases decided by this Court, viz.: *Mitchell Furniture Co. vs. Selden Breck Co.*, 257 U. S. 213; *Simon vs. Southern Railway Co.*, 236 U. S. 115; *Old Wayne Mutual Life Assn. vs. McDonough*, 204 U. S. 8.

The first case (257 U. S. 213) might be dismissed because it is not in point. The questions of fact there decided were that the corporation had withdrawn from the State and was not doing business at the time suit was commenced; and "if it had withdrawn from the State the agency of Nash did not extend to receiving service in a suit upon a contract made and to be performed as this was." The Court held that the contract, upon which the action had been instituted, was entered into a state other than the forum. The Court refused to take jurisdiction "when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence." In the case at bar, the Southern was actually doing business in the State of Louisiana at the time suit was instituted, and its duly appointed agent had not been withdrawn.

In the second case, *Simon vs. Southern Ry. Co.*, 236 U. S. 115, there is one vital fact missing which is present in the instant case, and that is, the appointment of an agent within the State to receive service of process. In the *Simon* case, service of process was made upon the Assistant Secretary of State. Defendant company, at that time, had no agent appointed in Louisiana. Suit was commenced in the State courts and judgment taken by default against defendant. No notice was ever served upon the Southern Railway Co. or any of its agents, save the notice served on the Assistant Secretary of State. The present case is different because the Southern, at the time this action was begun, had an agent in Louisiana voluntarily appointed to receive service of process. That is the very point this Court purposely and expressly declined to consider and decide. This Court said, at page 129 of the decision:

(236 U. S. 115): "We therefore purposely refrain from passing upon either of the propositions decided in the Courts below, and without discussing the right to sue on a transitory cause of action and serve the same on an agent voluntarily appointed by the foreign corporation, we put the decision here on the special fact, relied on in the Court below, that in this case the cause of action arose out of the State of Alabama, and the suit therefor, in the Louisiana Court, was served on an AGENT DESIGNATED BY LOUISIANA STATUTE."

This very question was considered and distinguished by the New York Court, in the case of *Bagdon vs. Philadelphia & Reading C. & I. Co.*, 217 N. Y. 432, wherein the Court said:

"The defendant concedes that it is engaged in business in New York. It insists, however, that his agency must be limited to actions which arise out of the business transacted in New York. It says any other construction would do violence to its rights under the Federal Constitution. But the plaintiff's cause of action has no relation to business transacted in New York. His cause of action owes its origin to business transacted in Pennsylvania . . .

"Two cases in the Supreme Court of the United States are said to be authority for that conclusion. They are *Old Wayne Mutual Life Ass'n vs. McDonough*, 204 U. S. 8 and *Simon vs. Southern Railway Co.*, 236 U. S. 115.

"In neither case had any agent for the service of process been appointed. In each the court was dealing with the consequences that attach to the refusal to appoint an agent. There was no attempt to decide anything but the precise question involved . . .

"The question now before us is not the one that was decided in *Simon vs. Southern*. It is the exact question which the Court refused to decide.

We are not required to consider how service could be made if the defendant had declined to file a stipulation, etc."

In the case of *Pennsylvania Fire Insurance Co. vs. Gold Issue Mining and Milling Co.*, 243 U. S. 93, this Court points out the fact that in the cases of *Simon vs. Southern*, and *Old Wayne Mutual Life Ass'n vs. McDonough*, no agent had been voluntarily appointed by the defendants, and this Court quotes with approval from the New York case just cited, *Bagdon vs. Phil. & Reading C. & I. Co.*, 217 N. Y. 432.

The third case relied upon by the Southern Ry. Co. to support its contention that the business out of which the cause of action arises must be done in the state where action is instituted, is that of *Old Wayne Mutual Life Ass'n vs. McDonough*, 204 U. S. 8. The cause of action in this case arose outside of the State where suit was instituted; no agent had been appointed by the foreign corporation within the state, and service was made upon the Insurance Commissioner under authority of state statute. This case is similar to the case of *Simon vs. Southern Ry. Co.* just discussed. It also lacks one of the vital elements present in the case at bar, viz: voluntary appointment of an agent to receive service of process within the foreign state.

None of these cases, relied on by the Southern, specifically decide the extent of Federal Court jurisdiction, with or without an agent. They are cases originally commenced in State courts, construe state statutes, and deal with default judgments against foreign corporations who have no agent voluntarily appointed within the state.

We maintain, the jurisdiction of Federal courts does not depend upon state statutes or the decisions of

its courts. All that the Federal court asks in determining its jurisdiction is: "Was the corporation present in the state by doing business? Was service made upon a duly appointed agent within the state?" Answering those questions in the affirmative, the Federal courts look no further.

We are aware of the decisions stating that the mere sale of a railroad ticket, or the soliciting of business, or the isolated transaction, or the mere ownership or control of a local corporation, each fact considered singly, does not constitute "doing business" within the state. But place all of those facts together, then add the following facts: That the corporation runs a train out of New Orleans under a joint agreement with other railroads; contributes its proportion of equipment for that particular train; takes care of the other railroad's equipment when in its possession; joins in the venture for the purpose of giving faster service than its competitors in order to derive the attendant benefits; add also the fact that it employs high officials within the state and pays a portion of their salaries; that it maintains three different offices within the City of New Orleans, one of them a ticket office in the heart of the city; that the ticket, upon which the suit is founded, was sold in New Orleans; and the confession of the Southern that it is doing business within the state by appointing an agent to receive process. The combination of those facts makes the conclusion that the company is doing business within Louisana irresistible. The District Judge, an able and esteemed jurist, a native of New Orleans, familiar with local conditions, found that the Southern was doing business in New Orleans; the Circuit Court of Appeals, one of the members a native of New Orleans, and the other two familiar with local conditions, found the Southern doing business in New Orleans. In 1904,

twenty-five years ago, the Circuit Court of Appeals, in the case of *Simon vs. Southern Railway Co.*, 195 Fed. 56, found that the Southern Railway Co. "was doing business in the Parish of Orleans, State of Louisiana."

It may be urged that it would be a hardship on a foreign corporation to be made to defend actions in any state in which it may be doing business. This action was instituted in the Federal District Court. The jurisdiction of that court is defined by the Constitution of the United States and the Laws of Congress. The Judicial Code specifically names only two forums, in cases of diversity of citizenship, either the domicile of the defendant or the domicile of the plaintiff. Therefore, an action in the Federal courts is localized to only two jurisdictions and is not spread so as to cover every state of the Union. It is just as inconvenient for a plaintiff to sue at the domicile of the foreign corporation as it is for the corporation to defend at the home of the plaintiff. Probably more so, because, as in this case, the defendant foreign corporation is fully represented by its agents, attorneys, and employees, whereas if the plaintiff herein was forced to sue in Virginia, the domicile of the Southern, he would be at a distinct handicap. If this suit were against an individual whose domicile, say, was in California, on a transitory cause of action arising in Maine, the jurisdiction of the Federal District Court for the Eastern District of Louisiana would be unquestioned, if the defendant were served personally in New Orleans. The inconvenience of the defendant in a case of that kind would be great. Why should a corporation enjoy more privileges and immunities? The courts are always eager to protect citizens of other states against default judgments rendered without notice to the defendant, and that is as it should be. All of the jurisprudence of this Court seeks to protect foreign corporations

against fraud and default judgments without notice. But where a corporation is present in the state, has an agent voluntarily appointed to protect its interests therein, and where service is properly made upon that agent, we submit it was never the intention of this Court to deny jurisdiction to the Federal courts under conditions of that kind.

LOUISIANA STATUTES AND JURISPRUDENCE AFFECTING SERVICE OF PROCESS ON FOREIGN CORPORATIONS

The Southern contends that jurisdiction of Louisiana courts, State and Federal, is entirely dependent upon Louisiana Statutes and the decisions of Louisiana courts. That the decisions of Louisiana courts are to the effect that in order for Louisiana courts, State and Federal, to acquire jurisdiction over a foreign corporation doing business in the State of Louisiana and having an agent appointed to receive service of process, it is necessary that the business out of which the cause of action arises must be done within the state.

Respondent denies that the jurisdiction of the Federal courts is dependent upon Louisiana Statutes and the decisions of its courts, but asserts that Federal jurisdiction springs from the Federal Constitution and the laws of the United States.

Whether or not the Louisiana Statutes and decisions of Louisiana courts maintain the contention of the Southern, with respect to origin of action, is very doubtful. However, before discussing these statutes and decisions, we make this notation. If it be true that the jurisdiction of the Federal court is determined by the Statutes of Louisiana, and if it be true that these statutes and the decisions of the state hold as essential to jurisdiction the

origin of the business out of which the cause of action arises must be done within the state, then, in that case, respondent maintains that the business out of which this cause of action arose was done in the State of Louisiana because the ticket, the contract of transportation, was entered into in New Orleans, State of Louisiana. It is admitted by the Southern that Chatters, respondent herein, purchased a through ticket from the L. & N. at New Orleans. This ticket called for transportation from New Orleans to Washington. Respondent boarded a train known as "Piedmont Limited." This train was operated jointly by the L. & N., A. & W. P., and the Southern, under a special agreement between the three companies. (Rec. p. 213.) In that contract of transportation, the Southern was either a principal, under the theory of partnership because of the peculiar facts existing in this case, which will be explained hereinafter, or it was represented by the L. & N., its agent, *quo ad* this particular contract. In either case the Southern transacted this particular piece of business in the City of New Orleans.

> "Where the arrangement existing between the associated lines of carriers amounts to a partnership, each will be liable to the passenger for losses or injuries occurring anywhere along the line of transportation."
>
> 10 C. J., p. 820, Sec. 1261,
>
> *Lehigh Valley R. Co. vs. Dupont*, 128 Fed. 840.
>
> "The initial carrier acts as principal merely with reference to its own line, and as agent of the connecting carrier in contracting for transportation over the connecting line."
>
> 10 C. J., p. 818, Sec. 1260.
>
> *Cowen vs. Winters*, 96 Fed. 929.

A contract for transportation is no different, in principle, than any other contract. A contract entered into by

and between the parties in Louisiana is a Louisiana contract. The present suit is based upon that contract. The contract was to be performed partly in the State of Louisiana and partly in several states of the Union. Foregoing the question of conflict of laws involving the *locus celebrationis* and the *locus solutionis*, as we are not concerned with the validity of the contract *vel non*, we restrict the use of the contract merely to determine whether or not this cause of action arose out of business DONE IN THE STATE OF LOUISIANA. When the Southern agreed with this respondent to convey him from Atlanta to Washington for a certain consideration, it entered into a contract whereby it sold an item of its regular stock in trade. The Southern is a railroad company; its business is to sell transportation, freight and passenger. In New Orleans, where the suit is brought, and where it is present doing a general line of railroad business and represented by an agent authorized to receive service of process, it performed a part of its regular business by selling, through an agent, passenger transportation. We are aware of the fact that the mere sale of a ticket within a foreign state, does not itself constitute such a doing of business as to give the local courts jurisdiction over a foreign corporation. We propose no such theory. Respondent's proof that the Southern is present in Louisiana is based upon other facts. We do maintain, however, that the sale of this ticket was the business out of which this action arose; that it is the contract upon which this action is founded; that it is the particular transaction which gives life and breath to respondent's suit.

Therefore, if this Court should conclude that the jurisdiction of the Federal court is determined by the State Statutes and the decisions of its courts, and that this case shall be determined by Louisiana Statutes and de-

cisions, then we have met all of the requirements set up by the Southern, viz.: the corporation is present in the State; it has an agent to receive service of process; the business out of which this cause of action arose was done within the State.

Supporting its contention that Louisiana Statutes and decisions require the cause of action to arise out of business done within the State in order that Louisiana courts might acquire jurisdiction over a foreign corporation, the Southern relies upon the three following cases: *Missouri Pacific R. R. Co. vs. Clarendon Boat Oar Co.*, 257 U. S. 533; *Delatour and Marmouget vs. Southern Railway Co.*, 4 La. C. A. 658; *Buscher vs. Southern Railway Co.*, 4 La. C. A. 653. The last two are companion cases arising out of the same transaction.

In the first case, the Missouri Pacific R. R. Co. was shown to be a Missouri corporation; Clarendon Boat Oar Co. a New York corporation; suit was filed in Louisiana, for breach of contract entered into and to be performed in the State of Arkansas. The court in Louisiana which passed upon this case is the Court of Appeal, a court having, at the time this decision was rendered, appellate jurisdiction over moneyed demands not exceeding $2,000, and of judgments rendered by justices of the peace. In our humble opinion, it did not properly construe the law nor the decision of the Supreme Court of Louisiana, *Watkins vs. North American Land and Timber Co.*, 106 La. 621, upon which the Court of Appeal founded its decision.

The case of *Delatour & Marmouget vs. Southern Ry. Co.*, 4 La. C. A. 658, was decided by the Court of Appeal for the New Orleans district. In that case the contract for transportation of horses was entered into at Bowie, Md.; accident occurred in South Carolina; suit filed in

State court of Louisiana. This case is partly predicated upon the fact that the Southern Railway Co. does no business in the State of Louisiana. The syllabus by the Court and the body of the decision amply prove this. The syllabus reads as follows:

> "In a transitory action arising in another state, the courts of this State, irrespective of the citizenship of the plaintiff, are without jurisdiction to entertain a suit brought against a foreign corporation **doing no local business within this State.**"

The Court failed to grasp the significance, if it was acquainted with the facts, of the sixteen employees directly employed by the Southern in New Orleans; maintaining three different offices; ownership by the Southern of two local railroads; the joint payment and employment by the Southern of local officials. The case lacked an essential and vital point present in the case at bar—the contract upon which respondent's case is based, was entered into in the City of New Orleans, and the joint operation of the train upon which respondent was injured.

We maintain the rulings of these inferior courts do not supersede the law laid down by the Supreme Court of Louisiana, the Court of last resort in all matters. The Supreme Court of Louisiana decided two cases on this question: *State ex rel. Watkins vs. North American Land & Timber Co.*, 106 La. 621, and *Williams vs. Pope Manufacturing Co.*, 52 La. Ann. 1417. In the *Watkins* case, 106 La. 621, the Court decided three points. One of the points, pertinent to this case, was that a foreign corporation could be sued in the State of Louisiana on a transitory action. The syllabus by the Court reads as follows:

> "Where such corporation has so far complied with the law as to establish an office in this State

> and designate an agent upon whom process may be served, service upon such agent vests the court issuing the same with jurisdiction to hear and determine the cause, IRRESPECTIVE OF THE CITIZENSHIP OF THE PLAINTFF, OR THE SUBJECT MATTER OF THE CONTROVERSY."

At page 627 of the decision, the Court quotes the Statute of Louisiana affecting service of process of foreign corporations doing business in the State and having an agent, and at page 629 it concludes its remarks on that statute in these words:

> "Nor do we find anything in that law whereby the jurisdiction acquired by service of process upon an agent authorized by a foreign corporation to receive the same is limited to any particular class of cases."

To fortify that position, the Court proceeds to cite various authorities and the jurisprudence of other states to the effect that a foreign corporation may be sued in the state where it is doing business irrespective of the origin of the action. At page 631 of the decision, the Court cites the case of *Pope vs. Manufacturing Co.*, 87 N. Y. 137, holding that a citizen of New York was permitted, by the laws of New York, to "sue a foreign corporation upon any cause of action, no matter where originated, and no matter whether the corporation was engaged in business or has appointed an agent to receive service of process in the state or not." In commenting on this case, the Louisiana Court said:

> "It is not necessary, nor would we be disposed, to adopt the extreme view last above referred to. On the contrary, we MIGHT hold that the jurisdiction acquired by service of process on respondent's agent in this State is confined to cases in which

> the cause of action arises here, and nevertheless maintain the jurisdiction so acquired in the instant case."

Then the Court goes on to show that the cause of action really arose in the State of Louisiana. The above last quoted portion of the case does not hold that the cause of action must arise in the State of Louisiana. As a matter of fact, the Court adopts the view, judging from the body of the case and the syllabus, that the cause of action need not arise in the State. The language just used was simply a supposition on the part of the Court to meet the argument that the cause of action must arise in Louisiana, and the Court said even if that argument be correct, the facts in that particular case met with that requirement.

The case of *Williams vs. Pope Mfg. Co.*, 32 La. Ann. 1417, decided by the highest court of Louisiana, positively holds that the Courts of Louisiana will entertain jurisdiction over a foreign corporation with an agent in the State irrespective of where the cause of action arose. The syllabus by the Court reads as follows:

> "The action of trespass is in its character and nature transitory, and follows the person of the owner, and has its *situs* at her domicile, and may be brought against the offender anywhere he may be found, whether a corporation or a natural person."

In that case, Mrs. E. J. Williams, a resident of Mississippi, brought suit against the Pope Manufacturing Co., a corporation of Connecticut, doing business in Louisiana. Suit instituted in State courts of Louisiana. The Court fully maintained the position set forth in its syllabus at page 1434 of its decision, where, after explaining the comity between the courts of the several states, said:

> **"For, if a citizen of Illinois may go into a court of Tennessee or Mississippi with an action for damages which were inflicted in Louisiana, he ought to be accorded a similar right of action in Louisiana courts for injuries inflicted in Mississippi. The legal deduction from this jurisprudence is that the cause of action on a tort or trespass is transitory, and follows the offending party into any jurisdiction wherein he may be found; and further, that, the right of action being personal to the complainant, he may bring it in any court that he may select."**

The last act of the Legislature of Louisiana, which has not been construed, with reference to service on foreign corporations, is Act 184 of 1924. It reads as follows:

> "Section 2. The appointment of the agent or agents or officer upon whom service of process may be made shall be contained in a written power of attorney accompanied by a duly certified copy of the resolution of the Board of Directors of the said corporation consenting and agreeing on the part of the said corporation that ANY LAWFUL PROCESS against the same which is served upon the said agent or officer SHALL BE VALID SERVICE upon said corporation—And that the authority shall continue in force and be maintained as long as any liability remains outstanding against said corporation growing out of or connected with the business done by said corporation in this State."

It will be seen that the first part of Section Two does not confine an action against a foreign corporation to liability growing out of or connected with the business done by said corporation in this State. It specifically says: "The appointment of the agent," etc., "shall be contained in a power of attorney," etc., "consenting and agreeing on the part of said corporation that ANY LAWFUL PROCESS

against the same," etc., "SHALL BE A VALID SERVICE UPON SAID CORPORATION."

The next portion of that section provides for the contingency of a removal of the agent from the State, by death, withdrawal, etc., in which case, in order to protect citizens of Louisiana who have done business with the corporation, "the authority shall continue in force and be maintained as long as any liability remain outstanding against said corporation growing out of or connected with the business done by said corporation in this State." If it was the intention of the legislature to limit actions against foreign corporations to matters arising out of business conducted, or connected with business transacted, in this State, that thought would have been incorporated in the first part of Section Two. The general language "ANY LAWFUL PROCESS" would not have been used. The restriction is used to protect citizens of Louisiana doing business with a foreign corporation should the agent's authority to receive service of process be revoked. The Circuit Court of Appeals, in the instant case, held that to be the logical construction of the Act.

We repeat, the jurisdiction of the Federal Court does not depend upon Louisiana Statutes or the decisions of its Courts. The requirements set down by this Court with respect to jurisdiction over foreign corporations, are, that the corporation be doing business in the State, and that service be made upon its proper agent. If this Court should not so hold and constitute the Statutes of Louisiana and the decisions of its Court as the determining factors of Federal Court jurisdiction, then we say the statutes and decisions of Louisiana have been complied with because: (*a*) The more authoritative decisions of the Courts of Louisiana do not require that the cause of action arise in Louisiana; (*b*) In the alternative, if they do, then, that

the business, out of which this cause of action springs, arose in Louisiana because the contract that forms the basis of this suit was entered into in New Orleans.

ALLEGED ERRONEOUS ADMISSION OF HEARSAY EVIDENCE WITH REFERENCE TO STATEMENTS MADE BY TWO DOCTORS NOT WITNESSES, COVERED BY POINT NO. TWO IN BRIEF OF SOUTHERN RAILWAY CO., CASE NO. 415.

The statements involved in this specification of error are quoted as follows (R. 116-7, 386):

> "I went to see Dr. Bloom twice and they told me my eye was getting very bad. I went to see Dr. Rudolph Matas * * * Dr. Matas said I was suffering with traumatic conjunctivitis."

This statement was made by the plaintiff under the following circumstances:

On the witness stand, respondent narrated his search for relief. His eyes were injured and he was suffering considerable pain. When he arrived in Washington, he was treated by Dr. C. P. Carmichael, who testified (R. 261) that he removed particles of glass from respondent's eyes. Fearing serious injury, respondent returned to New Orleans, his home. He immediately visited Dr. Wiltz (R. 116), who testified (R. 101) that he found respondent's eye "red, irritated and watery," and advised him to go to a specialist, "Dr. Simms." Dr. Simms testified (R. 109) that he "found some irritation, conjunctivitis," and kept him under treatment for about two weeks, prescribing "ordinary antiseptic treatment" "eye wash and ointment." Getting no relief, plaintiff sought other doctors. He went to an optician in New Orleans and "tried to get a pair of

glasses." (R. 116.) The optician would not prescribe glasses and took him to see Dr. Bloom, an oculist. He visited this doctor twice. Getting no relief, he visited Dr. Matas. This doctor advised him to see Dr. Hardin, an oculist. (R. 117.) Dr. Hardin treated him from April 1st to May 17th, 1926, and found respondent suffering from mild conjunctivitis, prescribing "drops, an astringent, and an ointment for the conjunctivitis." Later "treated the conjunctivitis with copper sulphate, and instructed him to continue that treatment that he had before that." (R. 215.) Obtaining no relief from this treatment, he visited Dr. R. A. Davis, who treated him from June 4th to September, 1926. R. 102.) In September, 1926, Dr. Davis found and removed a piece of glass from respondent's eye lid. (R. 102, 103.) This gave respondent instant relief. (R. 117.)

Respondent did not depend upon the two sentences uttered by Doctors Bloom and Matas, to prove his injury. It was only an explanation of why he left one doctor to visit another. Respondent proved his injuries by the testimony of Dr. C. P. Carmichael (R. 261), Dr. P. G. Wiltz (R. 101), Dr. J. E. Simms (R. 109), Dr. Geo. L. Hardin, defendant witness (R. 215), and Dr. R. A. Davis (R. 102). Those doctors treated respondent from the time of the accident until September, 1926. Dr. Bloom's statement and Dr. Matas' statement were made in March or April, 1926. There is in the record legal medical testimony to prove injuries covering a period of about three months before and a period of about three months after the alleged objectionable statements were made. No possible injury was suffered by the defendants as a result of this objectionable testimony.

> "Rulings as to evidence, although technically erroneous, will not constitute a ground for reversal where no prejudice results to the party complain-

ing." *Southern Pacific Co. vs. DeValle da Costa*, 190 Fed. 689;

4 C. J., page 963, Sec. 2948.

Sustaining the objection made to the two sentences uttered by these doctors would not have affected result:

> "A judgment will not be reversed, because of the erroneous admission of evidence, where it did not affect the result or could not have done so."
> *Union Cons. Silver Mining Co. vs. Taylor*, 100 U. S. 37, 42 25 L. Ed. 541;
> *Wilhite vs. Houston*, 200 Fed. 390, 118 C.C.A. 542.

Testimony objected to was unimportant and trivial:

> "Error in the admission of evidence is not ground for a reversal where it was not prejudicial to the party complaining, as where it was so utterly irrelevant or immaterial or unimportant that it was obviously harmless."
> *Meeker vs. Lehigh Valley R. Co.*, 236 U. S. 434, 35 S. Ct. 337, 59 L. Ed. 659;
> *Fidelity Mutual Life Assoc. vs. Mettler*, 185 U. S. 308, 321, 22 S. Ct. 662, 46 L. Ed. 922.

Strike out statements objected to and there remains abundant legal medical testimony—the testimony of five doctors to prove injury:

> "A rule which has been stated and applied many times by reviewing courts is that the admission of improper and objectionable evidence is harmless error where the fact involved is fully and clearly established by other evidence which is competent."
> *Cooper vs. Coates*, 21 Wall. 105, 110, 22 L. Ed. 481;
> *The William H. Webb vs. Barling*, 14 Wall. 406, 417, 20 L. Ed. 774;
> *St. Louis R. R. Co. vs. Duke*, 192 Fed. 306, 112 C.C.A. 564.

The hearsay statements of these doctors were made by respondent in leading up to and explaining his movements. They may be hearsay, but were used merely to explain his search for relief. They are not depended upon, and, as a matter of fact, proved nothing. The test in these matters is whether or not substantial injury was done to the complainants.

ALLEGED ERRONEOUS ADMISSION OF LETTER FROM THIRD PERSON TO PLAINTIFF ON CLAIM FOR LOSS OF EARNINGS, BEING ERROR NO. 3 CONTAINED IN BRIEF OF SOUTHERN RAILWAY CO.

Respondent did not attempt to prove his connection with the Mullins River Lumber Co., or the ability of the Mullins River Lumber Co. to fill orders sent in through respondent, by the letter forming the basis of this objection. Respondent testified to his loss of earnings with the Mullins River Lumber Co.; testified to the character of business done by this concern, and its ability to fill orders. (R. 120.) The letter objected to was in the nature of partial corroboration. It proved nothing that respondent had not testified to. Respondent's contract with the Mullins River Lumber Co. was introduced in evidence (R. 230, 231) without objection. The contract is in the form of a resolution subscribed to by the officers and board of directors of the Mullins River Lumber Co., appointing respondent general salesman for the company. If this letter were the only proof in the record of Chatters' loss with the Mullins River Lumber Co., then the objection might be good. Respondent claimed a loss of $500.00 in not being able to carry out the obligations of his contract with the Mullins River Lumber Co.; this disability being caused by the injuries received. He had a right to show by this letter just what he had done and expected to do. He was

on the witness stand, under cross-examination, and the defendants had an opportunity to go fully into the matter of his employment. The document in question antedates Chatters' accident. The contract, which is not objected to, is dated October 6, 1925; the letter objected to is dated November 5, 1925; respondent was injured on January 29, 1926. We repeat, there was no attempt to prove the contents of the letter by the letter itself. It was introduced for and served to corroborate respondent's testimony and to show that he had actually corresponded with the company relative to the purpose for which he was employed. Respondent proved the facts. The letter was secondary.

However, if any harm was done by this letter, which we deny, it was promptly and most efficiently repaired by the lower court when he said, in the presence and hearing of the jury: "The jury will consider the weight and sufficiency of the letter and the fact you have not had opportunity to examine the defendants in rebuttal." (R. 232.)

> "Collateral writings expressly referred to and made a part of an instrument introduced in evidence are admissible in explanation of the latter."
>
> 22 C. J., p. 861, Sec. 1032.
>
> "Letters or telegrams may be so connected with, and related to, an oral or written contract or other transaction as to become a part of the *res gestae* and be admissible as such."
>
> 22 C. J., page 904, note 43.
>
> *Allaun vs. Glen Brook Coal Co.*, 227 Fed. 835, 142 C.C.A. 359.

Admissibility of letter as part of *res gestae* within discretion of trial court:

> "Whether or not a declaration or an act is sufficiently so connected with the main facts as to be admissible as part of the *res gestae* is a matter

which rests largely in the sound discretion of the trial court."

22 C. J., page 460.

A further reason why defendants did not suffer injury as a result of this letter is that respondent's contract with the Mullins River Lumber Co. included the sale of hides, furs, skins, etc. (R. 231.) And the sale of stock of the corporation, for which respondent was to receive five per cent commission. (R. 120.) The letter involved only lumber sales.

"Rulings as to evidence, although technically erroneous, will not constitute a ground for reversal where no prejudice results to the party complaining."

Southern Pacific Co. vs. DeValle da Costa, 190 Fed. 689, 111 C.C.A. 417.

Respondent's testimony with reference to contract and the contract itself control facts—letter only cumulative:

"A judgment will not be reversed, because of the erroneous admission of evidence, where it did not affect the result or could not have done so."

Union Cons. Silver Mining Co. vs. Taylor, 100 U. S. 37, 25 L. Ed. 541;

Wilhite vs. Houston, 200 Fed. 390, 118 C.C.A. 542.

The letter was admissible in corroboration of respondent's contract. If admission of this letter is erroneous, the injury, if any, was not substantial and does not constitute reversible error.

ALLEGED ERRONEOUS DENIAL OF PEREMPTORY INSTRUCTION ON CLAIM FOR LOSS OF EARNINGS, BEING ERROR NO. 4, SOUTHERN RAILWAY CO.

If respondent's testimony is worthless, then we agree with counsel for defendants, the lower court should have directed a verdict against respondent for the loss of earnings as representative of the Mullins River Lumber Co. Why respondent's testimony should be destroyed, we do not know, except that it would help defendants to the extent of $500.00. Respondent's contract with the Mullins River Lumber Co. is printed in full on page 231 of the record. That shows the company was incorporated under the laws of British Honduras, "**and carrying on business** in the manufacture of lumber and other precious woods of various kinds, also dealers in furs, hides, skins, etc." Respondent's testimony (R. 120) shows that he was to also sell stock of the corporation and to receive five per cent commission therefor.

The contract heretofore referred to, signed by the president, vice-president, secretary-treasurer, and all directors of the corporation, shows that, in addition to mahogany lumber, the company was "CARRYING ON" a business for the sale of furs, hides, skins, etc. This contract did not mention that the corporation was in the process of organization, nor that the whole scheme was a "promoter's scheme." The contract is a rather practical and real proposition. Of course, some of the stock was yet on the market, and respondent was offered five per cent for whatever stock he could place in the United States. He was to receive $100.00 per month just as soon as he had formulated plans and the products were ready for delivery. (R. 120.) Just as he was about to produce results, this accident occurred

which incapacitated him. He was prevented from selling stock; he was prevented from selling lumber; he was prevented from selling skins, hides and furs. He lost whatever commissions he might have earned during that time. Though he made nothing as a result of this connection prior to the accident and the mill was unable to deliver lumber during the time of his disability, the accident actually prevented and delayed his receiving a salary of $100.00 a month for just so long as he was disabled. Plaintiff attempted to introduce into evidence another letter from the Mullins River Lumber Co., wherein said company agreed to pay plaintiff $100.00 per month, in accordance with respondent's testimony. The introduction was objected to and sustained, the lower court being of the opinion the letter might be self serving. (R. 234.) Five hundred dollars is not a very large sum of money and a man of respondent's ability could have easily earned this amount selling stock, furs, hides and skins, excluding lumber. The Court will note all of the officers and members of the board of directors certify in the contract with respondent (R. 231) that the company is "CARRYING ON BUSINESS IN THE MANUFACTURE OF LUMBER, etc." It will also be noted that the vice-president serving at the time of the contract was not connected in that capacity with said company when the interrogatories were sent to Honduras by defendant company. Respondent testified to what he lost with the Mullins River Lumber Co. as a result of his injuries. Should this testimony be destroyed by that of a vice-president, whose testimony was a surprise and could not be rebutted by interrogatories for the reason that the time between the arrival of the interrogatories and the date of the trial was too short. The only witnesses who could have rebutted this testimony resided in British Honduras.

However, the lower court heard all of the testimony and he concluded it was a question to be determined by the jury. The jury had all of the facts before them; the judge had all of the facts before him. The lower court was of the opinion that respondent's proof of his loss of salary was sufficient to place before the jury. The jury was unanimously of the opinion that plaintiff was entitled to all or part of this claim. Why should this Court concern itself with and disturb questions of fact, unless a foolish or frivolous claim was allowed? The judge of the lower court is noted for his sound thinking, learning and integrity. He would not have allowed a frivolous claim to go through. The jury was composed of reputable and intelligent business men of our community. If a fraud had been attempted, that jury, with the able assistance of attorneys for defendants, would have soon found it.

ALLEGED ERRONEOUS PEREMPTORY CHARGE OF JOINT LIABILITY, BEING POINT NO. 5, SOUTHERN RAILWAY CO.

This same error is alleged by the Louisville and Nashville Railroad Company, co-defendant herein, being Assignment No. 3 of specification of errors set out by that company in its brief to this Court. Inasmuch as this point affects the Louisville and Nashville R. R. Co. more closely, being the initial carrier and the accident occurring on the line of the connecting carrier, we will discuss this point in answer to the brief of the L. & N., being case No. 414, October Term.

CONCLUSION.

For the reasons assigned, we respectfully submit that the judgments under review, as to the Southern Railway Co., should be affirmed.

ANSWER TO BRIEF OF LOUISVILLE AND NASHVILLE RAILROAD CO., CO-DEFENDANT, CASE NO. 414, OCTOBER TERM.

Errors Specified.

Three errors are assigned by this defendant:

1st. Alleged error of Circuit Court of Appeals in not holding that the District Court was in error in refusing to direct a verdict in its favor;

2nd. Error of Court of Appeals in approving refusal of lower court to give a certain charge, prepared by the L. & N., with reference to its liability;

3rd. Charge of lower court with reference to "joint venture or joint enterprise" of two defendant carriers.

We will answer these points in the order stated.

ASSIGNMENT NO. 1—L. & N.

This point involves the liability of an initial carrier with respect to damages suffered by a passenger while on a connecting carrier.

At the outset, we admit that ordinarily an initial carrier is not responsible for what happens to a passenger while he is in the hands of the connecting carrier, particularly if the ticket issued to the passenger contains a provision, such as the ticket in this case did, that the initial carrier "acts only as agent and is not responsible beyond its own lines." It is understood that lines of a railroad company do not reach every point in the United States and it is necessary for a passenger to board a different train of a different company at intervals for the purpose of completing a long journey. In cases of this kind, ordinarily the train of the initial carrier is altogether

different from that of the connecting carrier. Passengers usually leave the train of the initial carrier and, either in the same station or at another station, board a train of the connecting carrier. Under these facts it would be unreasonable to hold the initial carrier for the acts of the connecting carrier, unless there is an agreement to the contrary, or unless there exist peculiar facts drawing the initial carrier into the transaction.

The facts in the case at bar are peculiar and distinct; they are quite different from the facts ordinarily found. The facts in the case of *Missouri Pacific R. R. Co. vs. Prude*, 265 U. S. 99, relied on by this defendant, are not the facts existing in the present case.

The facts here are that the Louisville and Nashville Railroad Co. and the Southern Railway Co. (a third company is involved, but that is immaterial to the discussion of the case) entered into an agreement to run a special through train called the "Piedmont Limited" from New Orleans to Washington, D. C., and from Washington to New Orleans. (R. 213.) Under this agreement, each component company was to furnish a certain number of the coaches composing the train, on the basis of mileage; each company was to furnish locomotive power and train crews over its own lines; each company, while in its possession, would **clean, wash and repair** the equipment of the other; each company would divide the fares on the basis of mileage. (R. 171, 210, 211.) The "Piedmont Limited" was a special through train. Each and every coach that left New Orleans would go through to Washington. The passengers remained in the same coaches from New Orleans to Washington and vice versa. (R. 210, 211.) The coach that respondent occupied from the time he left New Orleans until he reached Washington was Combination Car No. 698, the property of the Southern Railway Co., being

part of the equipment furnished under its agreement with the L. & N. (R. 207.) The L. & N. cleaned and washed this coach before placing it in the train which transported respondent to Washington. (R. 171.) In order to wash the windows it was necessary to remove the screens. (R. 171.) The screen which caused this accident, like all of the others, was fastened by means of two hinges on one side and a thumb screw on the other side. (R. 169.) In order to open them, it was necessary to remove the thumb screw. The contention of respondent is that the thumb screw holding the screen which flew open and caused this accident was improperly replaced by the employees of the L. & N. at New Orleans. Having improperly fastened this screen, it was guilty of negligence. It was further guilty of negligence in failing to detect the defect on its numerous inspections between New Orleans and Montgomery. The Southern took over the train with this defective screen. It also failed to detect the defect in its numerous inspections between Atlanta and Washington. The screen became unfastened gradually, and finally flew open near Washington. If the screen had been properly replaced at New Orleans, it would have remained fast. At New Orleans, by the L. & N., the screen was improperly replaced. It gradually worked itself loose. Proper inspection along the route would have found the danger. The L. & N. failed to find it; the Southern failed to find it, though a number of inspections were made by both roads.

Under these facts, how could the lower court possibly direct a verdict for the L. & N.? The whole question is one of fact. Was the L. & N. guilty of negligence? Did its negligence contribute to the accident? Did or did not the L. & N. properly replace the screen before the coach left New Orleans? These were questions for the jury. The lower court so held and the Court of Appeals affirmed his ruling. The fact that the screen did the damage while

in the possession of the Southern does not absolve the L. & N. of its negligence. That negligence started in New Orleans and continued in effect until the accident occurred. The case of *Missouri Pacific R. R. Co. vs. Prude*, 265 U. S. 99, quoted by this defendant, is not applicable. There the passenger purchased a round trip ticket from Forrest City, Ark., to Houston, Tex. She traveled on the line of the Missouri Pacific to Texarkana, Ark. From that point to Houston, she traveled over the line of the International and Great Northern R. R. Co. While on the line of the latter company, the passenger was assaulted by the auditor of the connecting line. Her ticket contained a provision limiting initial carrier's liability to its own lines. Passenger stated she did not read ticket. That case does not contain the vital element present here, viz., that the L. & N. was guilty of negligence in placing into service a defective car; that the negligence continued and traveled on unto the line of the connecting carrier and there caused the damage.

The provision stipulated on its ticket, limiting its liability to its own lines, cannot prevail against its negligence. A common carrier cannot by contract absolve itself of negligence. This would be contrary to public policy and an unreasonable regulation:

> "In analogy to the rule established by the great weight of authority in the case of carriers of goods, that any contract relieving the carrier from liability for negligence is invalid, IT IS WELL SETTLED THAT ANY CONTRACT PURPORTING TO EXEMPT A COMMON CARRIER OF PASSENGERS FROM LIABILITY FOR NEGLIGENCE OF ITSELF OR ITS EMPLOYEES TO A PASSENGER particularly when carried for hire, IS VOID, as being against public policy."
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> 10 C. J., p. 714, Sec. 1154;

Inman vs. South Carolina R. Co., 129 U. S. 128, 9 S. Ct. 249, 32 L. Ed. 612;

Phoenix Ins. Co. vs. Erie, Etc., Transportation Co., 117 U. S. 312, 6 S. Ct. 750, 29 L. Ed. 873;

Hart vs. Penn. R. Co. 112 U. S. 331, 5 S. Ct. 151, 28 L. Ed. 717.

"And the authorities are practically unanimous in support of the proposition that NO CONTRACT, CONDITION, OR LIMITATION WILL RELIEVE THE CARRIER FROM LIABILITY TO A PASSENGER carried for compensation FOR THE CONSEQUENCES OF THE NEGLIGENCE OF THE CARRIER OR ITS EMPLOYEES."

10 C. J., p. 714, 15, 16.

New York Cent. R. Co. vs. Lockwood, 17 Wall. 357, 21 L. Ed. 627;

Baltimore, Etc., R. Co. vs. McLaughlin, 73 Fed. 519, 19 C.C.A. 551.

The L. & N., under Assignment No. 1, quotes sub-sections 1 and 7 of Section 6 of the Interstate Commerce Act, as amended Feb. 28, 1920. It also quotes from a number of cases dealing with tariffs, rates, and charges. The act quoted and the cases cited relate to rates and fares and are not applicable to this case.

It is well settled that, when the relation of carrier and passenger exists, the passenger simply proves contract and his injury. The burden is then upon the carrier to prove that the accident happened through no negligence on its part. The doctrine is known as *res ipsa loquitur*:

Gleeson vs. Virginia Midland R. Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. Ed. 458;

New Jersey R., Etc., Co. vs. Pollard, 22 Wall. 341, 22 L. Ed. 877;

Midland Valley R. Co. vs. Conner, 217 Fed. 956, 133 C.C.A. 628;

Irvine vs. Delaware, Etc., R. Co., 184 Fed. 664, 106 C.C.A. 600.

Carriers owe the highest degree of care, skill and diligence to passengers:

Pennsylvania Co. vs. Roy, 102 U. S. 451, 26 L. Ed. 141;

Irvine vs. Delaware, Etc., R. Co., 184 Fed. 664, 106 C.C.A. 600;

Columbia, Etc., R. Co. vs. Means, 136 Fed. 83, 68 C.C.A. 651.

This defendant cited several cases to the effect that the doctrine of *res ipsa loquitur* does not apply against a party when the instrument is out of his control and management. These cases involved either an employee, or that the defect was not caused or contributed to by the company against whom it was urged. None of them release the initial carrier of negligence to a passenger simply because the negligence does not cause damage until the instrument is in the hands of another.

ASSIGNMENTS NOS. 2 AND 3—L. & N.

These assignments cover the special charge requested by the L. & N. and the charge actually given by the lower court.

As to the requested special charge. The trial court clearly distinguished the liability of the two defendant companies and we will so demonstrate in a discussion of the charge actually given.

However, it is impossible to separate the L. & N. from the Southern with respect to this PARTICULAR TRAIN called the "Piedmont Limited," and more particularly with respect to the coach which caused this accident. The L. & N. and the Southern are jointly liable for three reasons:

1st. The defective coach that caused plaintiff's injuries was owned by the Southern; it was incorporated

into a train operated out of New Orleans by the L. & N.; the only possible explanation of the accident is that the L. & N., in replacing the screens, after washing windows, failed to properly replace the screens; that the defect continued until the coach was turned over to the Southern; that the Southern had possession of the train from Atlanta to Washington, made numerous inspections but negligently failed to find the defect. In order to free themselves of liability, the doctrine of *res ipsa loquitur*, placed the duty upon the L. & N. and the Southern to show that neither was guilty of negligence. They utterly failed to explain the cause of the accident. The only evidence in their behalf is "inspections." The L. & N. failed to prove it was free of negligence; the Southern failed to prove it had rendered to this passenger the highest degree of care, skill and diligence. How can the liability of these two roads be separated?

2nd. The operation of this train called the "Piedment Limited," unquestionably shows some sort of partnership arrangement. Each of these defendants entered into an agreement with the other to run this PARTICULAR TRAIN (R. 213). The purpose, it is only natural to infer, was to discourage passengers in the use of other roads because of the convenience and speed offered by this PARTICULAR TRAIN. The two defendants each furnished a certain number of coaches and other equipment for every train; each road repaired and cleaned the equipment of the other; the particular coach in which this plaintiff was injured was the property of the Southern and incorporated into the train of the L. & N.; each road divided the money paid by passengers, on the mileage basis:

> "The definition of a partnership which seems to be most accurate and comprehensive is that of Chancellor Kent, as follows: 'A contract of two or more competent persons to place their money,

effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions.'"

3 Kent. Comm. (30 Cyc., p. 349).

"In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than * * * that those persons are partners, who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions."

Meehan vs. Valentine, 145 U. S. 611, 623, 12 S. Ct. 972, 36 L. Ed. 835.

Of course we do not propose the theory that the L. & N. and the Southern are partners in all of their respective operations; but it is urged that with respect to this particular train, "Piedmont Limited," the facts are so overwhelming and convincing that no other conclusion can be reached.

"Ordinarily the owners of a ship are not partners; but when it is built under a special agreement, whereby one of the owners is to be master and the other to be ship's husband, and the vessel is employed on joint account as a regular packet between certain stations, it is a partnership affair, both as to ship and freight."

30 Cyc., pages 367, 368, note 93.

This principle was upheld in the case of *Lehigh Valley R. R. Co. vs. Dupont*, 128 Fed. 830, where the Court said:

(At page 843): "The freight and passenger business between the two corporations has been done upon a mileage basis, the charges being prorated, and each receiving its proportion."

(At page 845): "And where the lines of several railroad corporations are conducted as a single system for the purpose of the traffic between dif-

> ferent points originating upon either, the corporations may constitute themselves a partnership for the business of such traffic; and when they do, although the general management of each road is retained by the corporation owning it, the several corporations are, as to such business, partners, and liable upon the principles of the law of agency."

The third point, indicated above, upon which the liability rests upon these defendants jointly, is that the "Piedmont Limited," was a THROUGH TRAIN. That it is so, is amply proved by Mr. Bose, L. & N. official, in his testimony (R. 210). The train is advertised as a THROUGH TRAIN by both companies. Every coach, every sleeper, and "even the day coaches" go through from New Orleans to Washington. (R. 211.) It is known to the railroads, to railroad men, and to the public in general from New Orleans to Washington that the "Piedmont Limited" is a limited, through train. What is the jurisprudence on the question of liability of the initial carrier when a THROUGH ticket is sold? It may be called a coupon ticket, transfer, contract or any other name. The name given to the ticket does not alter the service promised and given. We do know that the "Piedmont Limited" is a through train:

> "Where the contract of the carrier selling the ticket is for THROUGH TRANSPORTATION, it is the principal, and the connecting carrier continuing the transportation of the passenger under such ticket is the agent of the carrier selling the ticket for the purpose of carrying out the contract of transportation, and in such case the CARRIER SELLING THE TICKET WILL BE LIABLE FOR ANY FAULT OF THE CONNECTING CARRIER OR ITS EMPLOYEES."
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> 10 C. J., p. 820, Sec. 1261, note 69.
>
> *Lehigh Valley R. R. Co. vs. Dupont*, 128 Fed. 840;

Clements vs. Wash. P. S. B. Co., 162 Fed. 815, 89 Am. D. 147;

Chollette vs. Omaha, Etc., R. Co., 26 Nebr. 159, 4 L. R. A. 135.

"Where a passenger purchased a through ticket over several roads from one of them, authorized to act in this regard for the others, all the roads are liable for injuries to her from the negligence of any one of them."

El Paso & N. E. Ry. Co. vs. Landon, 124 S. W. 744, 58 Tex. Civ. App. 397;

Texas Cent. R. Co. vs. Marris, 101 S. W. 1177, 100 Tex. 530.

"Where the shipper receives an injury beyond the line of the initial carrier, caused by a defective appliance on the car, even though the connecting carrier is charged with the duty of inspecting the car, its failure so to do will not relieve the initial carrier from responsibility for negligence in assigning the shipper a defective car."

Blatcher vs. Philadelphia, Etc., R. Co., 31 App. (D. C.) 385, 16 L. R. A. (N. S.) 991;

Brook vs. Brooklyn Union El. R. Co., 148 App. Div. 668, 133 N. Y. S. 253;

Missouri, Etc., R. Co. vs. Ryan (Tex. Civ. A.) 177 S. W. 525;

Missouri, Etc., R. Co. vs. Foster, (Tex. Civ. A.) 87 S. W. 879.

However, should this Court hold that the agreement between the two defendant companies does not constitute a partnership, and that a contract for through transportation does not hold the two companies jointly liable, nevertheless the two companies remain responsible jointly on the question of negligence which started in New Orleans and continued until the moment of the accident. As previously stated, the testimony of the two New Orleans inspectors for the L. & N. (R. 171, 177) shows that the screens

on this particular coach were opened, just prior to its departure, for the purpose of washing the windows. Unquestionably the thumb screw, which holds the screen fast to the body of the car, was improperly replaced and gradually worked loose until it pulled out and caused the accident. It is the only plausible explanation, particularly so since the defendant companies fail to explain. Everyone of those screens were opened. All of the thumb screws were removed and replaced. Only one flew open. Therefore, the question of fact to be determined by the jury, and it was so instructed by the trial court, was: Did the car cleaners of the L. & N., at New Orleans, properly replace the thumb screws? This phase of the L. & N.'s activities with reference to the operation of the "Piedmont Limited" was under the charge of its employees; those employees failed to give the highest degree of care, skill and diligence owed to the passengers. The negligence continued until the train was placed in the care of the Southern, and that road failed to find the defect, although the train was inspected a number of times along the route.

CHARGE GIVEN BY TRIAL COURT.

The special charge requested by the L. & N. was refused because it was contained in the general charge given by the lower court:

> "It is elementary and well settled that the court may properly refuse requested instructions, although they announce correct rules of law, where the propositions therein enunciated are fully and correctly covered by the general charge or by either instructions given on request of either party."
>
> 38 Cyc., p. 1711 (e).
>
> *Maryland Fidelity, Etc., Co. vs. Courtney*, 186 U. S. 342;
>
> *Northern Pac. R. Co. vs. Babcock*, 154 U. S. 190;

Brown vs. U. S., 150 U. S. 93;
Ayers vs. Watson, 137 U. S. 584.

The Circuit Court of Appeals held that the special requested charge was contained in the general charge. It further held (R. 429) that the requested charge omitted "any mention of the L. & N.'s preparation of the car for its entire journey from New Orleans to Washington," • • • and "was calculated to divert the jury from the consideration of the question as to due care being or not being used in replacing and refastening the screens before the car left New Orleans."

> "The giving of instructions which are abstract or are not authorized by the pleadings and evidence will not constitute ground for reversal, where no prejudice results to the complaining party; and this is so whether or not the instructions state correct rules of law. This principle has been applied to instructions • • • relating to the joint liability of employers for injury to servants."
>
> 4 C. J., pages 1033, 34 and 35.
> *Snyder vs. Rosenbaum*, 215 U. S. 261, 265, 30 S. Ct. 73, 54 L. Ed. 186;
> *Georgia R. R. Co. vs. Hunter*, 12 Ga. A. 294, 77 S. E. 176.

Comparing the special charge with the charge given by the trial court, we fail to find any substantial difference. The jury's attention is called to the statement printed on the back of the ticket and limiting the liability of the initial carrier, saying that condition would be binding upon the passenger. (R. 372.) It went further, saying: "But in this case the selling or initial carrier, • • • did something more than merely sell the ticket. It participated in the joint operation of the train, a sort of partnership." (R. 373.) The Court then summarized the testi-

mony of Mr. Bose, the L. & N. official, showing beyond doubt that, in truth and in fact, the train was jointly operated by the two defendants.

On pages 373, 374 on the record, the Court explained the respective duties of the carriers. Quoting therefrom:

> "The Southern Railway Co. on receiving this train was likewise obligated to this passenger, and to escape liability the burden was upon the Louisville & Nashville R. R. Co. to show positively that this equipment, this latch on this particular screen in this case, was in good order when it left here, not worn, or in some other manner affected by the weather and age, and shift the burden thereby to the Southern Railway to show positively to your satisfaction that it used the highest degree of care and prudence in handling of the train after it received it."

This charge told the jury how the negligence of either or both of the defendants was to be determined. If it was found that the L. & N. had carried out its legal obligations, it was to be released. If the Southern proved it performed its legal duty towards the passenger, then it was to be released.

Following this question further, we find at page 376 record, a statement made by the trial court in the presence of the jury: "I think I made it clear that the liability was on both, since both were jointly liable and jointly sued, to show that neither of them were guilty of negligence *quo ad* the plaintiff." Again, at page 378 record: "Mr. Suthon: 'Finding for both defendants or either defendant.' The Court: 'Finding against either one or both.'" The charge taken *in toto*, clearly demonstrates that the jury was instructed to find for the plaintiff against either the L. & N. or the Southern, or against both, or against plaintiff.

The complaint of the L. & N. because of the refused special charge is directed at the refusal of the Court to use the particular words contained in the special charge, rather than the omission of the Court to charge the law as requested:

> "The decisions almost universally hold that a judge is not bound to charge the jury in the exact language of the requests for instructions by counsel. Although the requested instructions be correct as propositions of law and warranted by the evidence, the form of expression may be his own. If he instructs the jury correctly and in substance covers the relevant rules of law proposed to him by counsel, there is no error in refusing to adopt the exact words of the request."
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> 38 Cyc., page 1704.
>
> *Cunningham vs. Springer*, 204 U. S. 647, 27 S. Ct. 301, 51 L. Ed. 662;
>
> *New York, Etc., R. Co. vs. Winter*, 143 U. S. 60, 75, 12 S. Ct. 356, 36 L. Ed. 71;
>
> *Continental Imp. Co. vs. Stead*, 95 U. S. 161, 24 L. Ed. 403;
>
> *Clymer vs. Dawkins*, 3 How. 674, 11 L. Ed. 778.

CHARGE ON JOINT LIABILITY

The charge of the trial court with respect to "joint liability" and "joint operation" is not and was not meant as a statement of law covering every case. Whenever those phrases were used, they were joined with the opinion of the judge with respect to the evidence produced on this trial. **"Under the circumstances as they are shown here** the liability of these two defendant carriers is joint." (R. 373.) **"Here is** a joint enterprise, etc." (R. 373) referring to the facts brought out in the evidence. Therefore, the charge of the trial court is not that in every case where there is a connecting carrier, the liability is joint. He states clearly and specifically, that the evidence ad-

duced in this particular case shows a joint operation of the train and a joint liability. However, explaining to the jury that they might find against either or both of the defendants. Whether or not the operation of the "Piedmont Limited" was a joint enterprise was a matter of fact, within the realm of the jury. The complaint made by the defendants against the charge of the trial court is **not** against the law therein set forth, **but against the right of the trial court to comment on the evidence.** The judge heard the evidence, and, in commenting thereon, he stated the proof tended to show that the operation of the "Piedmont Limited" was a joint enterprise. However, the jury was the judge of the facts, and were told they might disagree with him and bring in a verdit against either of the defendants.

CONCLUSION.

It is submitted that, for the reasons hereinabove assigned, the judgments of the two lower courts should be affirmed.

Respectfully submitted,

GEORGE PIAZZA,
ST. CLAIR ADAMS,
Attorneys for Aaron A. B. Chatters, Respondent.